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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES ITSUKI MCCLARY, Defendant and Appellant.	A153621 (Solano County Super. Ct. No. VCR213614)

On appeal from a judgment following his plea of no contest, James McClary contends the court erred (1) when it denied his motion for independent counsel to advise him on whether to withdraw his plea, and (2) in the calculation of his presentence custody credits. McClary also asserts his trial counsel rendered ineffective assistance at sentencing by failing to obtain a correct calculation of credits. None of these issues are cognizable in this appeal, so we dismiss.

BACKGROUND

In August 2017, McClary was charged in Solano County with possession of a short-barreled rifle, possession of a firearm by a felon, and possession of a controlled substance with a firearm. The information alleged McClary had served four prior prison terms.

In October 2017, the information was amended to add a charge of being an accessory to possession of a firearm by a felon. McClary pleaded no contest to this new count in exchange for an eight-month prison term with credit for time served and

dismissal of the remaining charges. It was agreed the sentence would be consecutive to a seven-year sentence out of Riverside County for an earlier offense.

The case came on for sentencing on December 20, 2017. The court denied a defense request that the eight-month term be imposed concurrently rather than consecutively and observed that McClary "has completed even the consecutive term . . . with local time, and I would make that finding as well now. [¶] What I do here has no bearing on what happens out of Riverside. If there's a beef about his credits out of Riverside, I think it has to be taken back there." Both parties agreed that McClary's local credits exceeded his eight-month term. The court declined to formally calculate McClary's credits in the Solano county case. It observed that any effect on McClary's credits in the Riverside case "is not being decided today. . . . [I]f he believes that they are miscalculating his credits out of Riverside County, that can be taken up with Riverside County."

After a brief discussion with his attorney, McClary moved to withdraw his plea because "he was under the impression that a concurrent sentence would be . . . appropriate as opposed to the consecutive sentence that was pre-negotiated prior to his plea." The court denied the motion without prejudice and imposed the agreed eight-month term consecutive to McClary's Riverside commitment. On February 1, 2018, McClary filed a timely appeal from the judgment purportedly "based on the sentence or other matters occurring after the plea."

When he filed his notice of appeal, McClary had a motion pending in the trial court for an order appointing independent counsel to advise him on the merits of moving to withdraw his plea. The hearing was held February 16. Defense counsel clarified that the basis for the motion "wasn't so much the actual number of credits," as the court had understood from the written motion, but rather that "when [McClary] was entering the plea . . . he misunderstood the calculation of consecutive versus concurrent, and when he was finally sentenced, it dawned upon him that it was the wrong type of sentencing." The court denied the motion. It explained: "First of all, I don't see that there's any reason for that. I don't think I have jurisdiction to allow him to withdraw the plea. He's been

sentenced in this matter." Observing that McClary's credits were not calculated at sentencing, the court awarded him 272 days in actual and good time credits "so he has no further time to serve in this case."

DISCUSSION

I. The Request for Independent Counsel

McClary asserts the court erred when it failed to treat his motion for independent counsel to advise him on whether to withdraw his plea as "akin to a *Marsden* motion" and, as such, to grant it. This claim is not properly before us. The notice of appeal, filed February 1, 2018, is from the December 20, 2017 judgment. McClary has not asked this court to exercise our discretion to treat it as a premature appeal from the February 16 order (Cal. Rules of Court, rule 8.308(c); see *People v. Denham* (2014) 222 Cal.App.4th 1210, 1214) or suggested any reason we should do so.

In any event, the claim is not cognizable even if we construe the notice of appeal to encompass the February 16 order. Under Penal Code section 1237.5,[1] with exceptions that do not apply here, a defendant may not appeal from a judgment of conviction upon a guilty or no contest plea unless he or she has obtained from the trial court a certificate of probable cause based on a showing of reasonable constitutional, jurisdictional, or other grounds for appeal going to the legality of the proceedings. (*People v. Johnson* (2009) 47 Cal.4th 668, 676-677.) If a defendant who pled guilty or no contest challenges the validity of the plea on appeal without having obtained a certificate of probable cause, we may not proceed to the merits of the appeal but must instead order its dismissal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096 (*Mendez*); Cal. Rules of Court, rule 8.304(b).)

McClary's motion sought the appointment of new counsel to advise him on withdrawing his plea, but the result is the same. "In determining whether an appeal is cognizable without a certificate of probable cause, ' "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.]' [Citation.] If the challenge is in substance an attack on the validity of the

[1] Further statutory citations are to the Penal Code.

plea, defendant must obtain a certificate of probable cause." (*People v. Emery* (2006) 140 Cal.App.4th 560, 564–565 [appeal challenging denial of a continuance to permit motion to withdraw requires certificate of probable cause], quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 76; *People v. Johnson, supra,* 47 Cal.4th at pp. 679-682 [claim of ineffective assistance of counsel at hearing on motion to withdraw plea requires certificate of probable cause].) Accordingly, [w]hether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, *or merely seeks an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid*, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*People v. Johnson, supra,* 47 Cal.4th at p. 682, italics added.) This is such a case. McClary did not obtain a certificate of probable cause to appeal the order denying his motion for independent counsel to advise him on withdrawing his plea, so this claim is not cognizable on appeal.

II. Presentence Custody Credits

The abstract of judgment reflects 136 days of actual credits and 136 days of section 4019 conduct credits, for 272 days of presentence credits. McClary contends the correct total is 1,483 days of credit, comprised of 566 days in this case and 917 days awarded by the court in Riverside. This claim, too, is not properly before us.

Section 1237.1 provides: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." (See *People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519 [formal motion in trial court is required predicate for appeal of credits award]; *People v. Fares* (1993) 16 Cal.App.4th 954, 958.) The prerequisite may be disregarded when the appeal also presents issues other than credits (*Mendez, supra,* 19 Cal.4th at p. 1101; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428), but, as we explained above, McClary's only other claim is not cognizable on

appeal. Accordingly, his challenge to the calculation of his credits, including his claim that trial counsel rendered ineffective assistance by failing to obtain a correct calculation, must be dismissed without prejudice to any right he has to seek relief in the trial court.[2] (See *People v. Clavel*, *supra*, 103 Cal.App.4th at p. 519.)

DISPOSITION

The appeal is dismissed.

[2] The Attorney General agrees that the Riverside credits should be added to the abstract of judgment and acknowledges a discrepancy in the record as to McClary's credits in Solano County. McClary's appellate counsel represents (without providing any supporting records) that the credits issue was raised in a letter to the Solano County trial court in September 2018, and that the court has since revised the award to 917 days against the Riverside case and 272 days against the Solano case. That forum presumably offers the most appropriate method for correcting any remaining errors in the calculation of McClary's credits. (See *People v. Acosta*, *supra*, 48 Cal.App.4th at pp. 423-425.)

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Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Wiseman, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.